88-1568

No.

Supreme Court, U.S.
FILED
MAR 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

GEOFFREY A. DI BELLA, M.D.,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Indictment description of "approximately" destroys proper evaluation and therefore judgment must be vacated.

2. Aggregate act of prescribing is not a crime and therefore judgment must be vacated.

3. Prescribing of drugs by a doctor without wrongful intent is not a crime and therefore judgment must be vacated.

4. Failure by Courts to adequately review case requires judgment to be vacated.

5. Failure by Courts to adequately review Habeas-2255 petition requires judgment to be vacated.

LIST OF PARTIES

The parties in this case are Geoffrey A. Di Bella, M.D., and the United States of America, as shown in the caption. This Petition does not concern the other persons who were Defendants in the case.

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No.

In the Supreme Court

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MARCH TERM, 1989

GEOFFREY A. DI BELLA, M.D.,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Geoffrey Di Bella, M.D., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, denying relief under the doctrine of Habeas Corpus and 28 U.S.C. 2255 relating to a judgment of conviction entered against him by the United States District Court for the Southern District of New York.

OPINIONS BELOW

The Denial, not officially reported, appears herein at Appendix B. The opinion of the Court of Appeals, also not officially reported, concerning the original case appears herein at Appendix E.

JURISDICTION

The Judgment of the Court of Appeals was entered on October 20, 1988 and the request for re-hearing was denied on December

21, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1), 28 U.S.C. 2255, and Article I, Section 9 of the Constitution.

STATUTORY PROVISIONS

The statutes involved are 21 United States Code, Sections 802, 822, and 841. Also, involved is 21 Code of Federal Regulation § 1306.04 (a). The pertinent parts of the statutes and Regulation are set forth in the appendix, part C.

STATEMENT OF THE CASE

Introduction

There was a revolution and this country was founded because certain principles were considered so basic, so fundamental, so essential that they had to be part of a civilized society. Those principles all involve justice. Some like Due Process, Habeas Corpus, Trial by Jury are specifically set forth in the Constitution and others are so intertwined with a fair application of those concepts—like instructing the jury properly, following the legal procedures that are required, having a meaningful attorney-client relationship, having an appeal that truly evaluates the trial's fairness—that they necessarily must be considered a part of Constitutional Rights. In our twentieth century American society is this all to be forgotten? Superficial judgments are being made, and apparently the Courts now are more concerned about "moving cases", thereby counting numbers to justify their existence, instead of assuring that justice is done in each case. In addition there seems to be a hysteria about anything that involves "drugs" so that careful evaluation is no longer deemed appropriate. Unfortunately, this superficiality has struck this case—it hasn't been properly handled—and now it is imperative that the Court act to rectify the matter.

Perhaps part of the reason for the Courts failure to act properly was that this case doesn't fall under the categories of gimmicks or of sensationalism. Perhaps the lower Courts would have been more concerned about the many errors that occurred if that had been the case. So, no—this is not about a grisly murderer, a mafia

chieftain, or a crazed sex assaulter. There has been no movie made that is pressuring the Court to do what it should have done in the first place. Newspaper headlines and articles have not been written urging the Court what to do. But that doesn't mean this case is not important. It is important. Obviously, it is important to the Appellant because a great injustice has been done to him. It is important because it indicates the Courts are not working properly and therefore they need to be directed to get back on the proper course. It is important because the law deals with the practice of medicine and there is great conflict in the interpretation of the laws applicable to this kind of case. There are over 500,000 doctors in the United States—this case effects every one of them.

The Charge and the Results

In December 1984 Dr. Di Bella was indicted for conspiracy to distribute and two substantive counts of distribution of methaqualone ("quaaludes") a "Schedule II" controlled substance. The indictment, which named eight defendants in various combination of counts, concerned the activities of an organization called Jorum, which the government alleged served as fronts for the distribution of quaaludes. Dr. Di Bella was one of five physicians named in the indictment, each of whom worked for various periods at the clinical facilities run by Jorum in the City of New York. Following a jury trial, Dr. Di Bella was acquitted of conspiracy, but convicted of the distribution counts.

He was sentenced to concurrent sentences of two years imprisonment, to be followed by two years of special parole, and a $5,000.00 fine. He presently is on the special parole.

Potentially Negative Aspects of the Case

An understanding of some of the alleged indicators of illicit conduct will assist in an understanding of this case and, will further indicate why the overturning of this case is mandated. A potential damaging inference may arise from the fact it involves a controlled substance drug. That would not be a fair inference. This arrangement with Jorum was considered a specialized prac-

tice for treating insomnia wherein the treatment mode was a drug, and the drug of choice was quaalude (methaqualone). At the time Methaqualone was a schedule II controlled substance drug. However, this merely means theoretically it has a high potential for abuse. It wasn't and isn't clear if "abuse" meant in a recreational sense or in a dangerous sense, like addictive or life threatening. That wasn't brought out clearly in trial, though it seemed there was an attempt at one time to portray the drug as dangerous. Likewise it wasn't brought out in trial if it was, in fact, considered dangerous by the medical community. Further, no patient was brought out to show that patent had been harmed. Regardless, the drug very clearly at the time was considered appropriate for insomnia, and there was little testimony that the drug, in relation to some other drug, was not appropriate for the patients who were seen at the Jorum facility. Indeed, no one contradicted Dr. Di Bella's testimony that it was an excellent drug for the treatment of insomnia.

Another factor that was suppposed to infer a knowledge of wrongfulness was the amount paid to the Doctors. To be sure the fee paid by the patient, $150.00 to $200.00, was high but the bulk of the money went to Jorum. When analyzed about who got the most money this seems to re-enforce the view that Dr. Di Bella was naive about the nature of the patients, and was as much a victim as anyone else.

Indeed, a careful review of the facts will point to only one conclusion. Dr. Di Bella was a very naive doctor, and inexperienced about operating a medical practice, and because of these factors unknowingly became a participant in a sham medical operation. The fact that the prosecution was unable to bring forth a witness to say that Dr. Di Bella ever behaved as if this was a sham is only one of many aspects of the evidence which suppports this interpretation. Unfortunately, detailed background of Dr. Di Bella was not provided at trial nor did he give, at trial, an explanation of his impressions when he testified because he was under the mistaken belief he was to be as detached and unemotional as the situation allowed. Nevertheless, a review of the psychological reports done after trial, which are part of the Reply Brief in case no. 86-1224 (Second Circuit) and the Reply Brief in

case no. 88-2225 (Second Circuit) confirm and make it overwhelmingly clear that Dr. Di Bella had no wrongful intent at the time he wrote the prescriptions which are the subject of this case.

Inappropriate Evaluations

No one is asking that you believe Dr. Di Bella at this point in time. All that is being asked is that the Courts follow the law. Despite repeated requests this hasn't happened. Accordingly it is necessary to explain some of the issues which have been raised and the Courts failure to adequately judge them. To begin with the trial was not a fairly conducted forum attempting to ascertain the truth. For example, the Judge made no effort to control the testimony of the expert witnesses and therefore their testimony improperly used legal language which at the least confused the jury, and, in any event, usurped their function. Numerous exhibits and compilation of exhibits were allowed into evidence without proper foundation. Two points deserve particular emphasis and therefore need to be brought out for the purposes of this Brief. One, and a major problem that compounded the unfairness of this trial, was that Dr. Di Bella didn't explain his point of view in personal terms concerning why he acted as he did. Second, the instructions to the Jury were wrong. Arguably, they were very close to being correct, but since so much of this case depended on an analysis of Dr. Di Bella's mental state, to imply to the jury that an analysis of Dr. Di Bella's mental state was not necessary—because an objective standard of evaluation applied to the situation—plainly was error. In other words, the fact of the matter was that the law as explained to the jury was not and is not the law!

Court of Appeals Failures

The failure to follow the law is even more frightening in the Court of Appeals. It was and is absolutely extraordinary that the Courts make the superficial analysis that they have and think of Dr. Di Bella as such a simple-minded person. It is not surprising that in their cursory opinion they don't get the facts right.

An examination of the Appeals Court opinion, Appendix E, shows this to be the case. They mention Dr. Di Bella, but make no distinction between him and the other doctors. Everyone agrees this was not the case. Everyone agrees that the Doctors worked at Jorum at different times. Further, the Doctors followed different procedures and spent differen amount of times with the patients. For example, Dr. Di Bella was the only one who introduced hand-outs advising of the proper use of methaqualone. The Court also mentions one doctor, Dr. Gourji, as if to say he realized his guilt subsequent to trial and therefore didn't waste everyone's time with an appeal. That was completely wrong. It again shows the lack of real examination of the case. That doctor simply had not been sentenced by the time of the appeal and therefore couldn't appeal. (Entry of judgment must take place before an appeal may be submitted). And that doctor, later did, in fact, appeal. If they can't get the facts correct then it isn't any wonder that they didn't get the law correct. No other jurisdiction agrees with the Second Circuit in their lack of requirement of a mental state. No other jurisdiction says that a doctor's mental state is not a necessary component in a guilty finding in relation to the illegal prescribing of drugs.

Habeas Corpus "2255" Procedure Didn't Rectify Errors

The issues were properly raised before the trial Court in a motion after the Verdict, again raised in the Court of Appeals, again raised in a Writ before the Supreme Court, again raised in a Request for a Writ of Habeas Corpus before the Trial Court ("2255 motion"), and again raised with the Court of Appeals. The lack of consideration given to these issues is, by itself, a fundamental denial of due process.

The improper interpretation of the law is not just a remote instance. It happens throughout the case. Accordingly, even though Appellant again has raised all the issues in the 2255-Habeas Corpus procedure—and in addition raised the illegality of the procedure, and the ineffectiveness of counsel—the trial Court and the Circuit Court for the Second Circuit Appellate Division have not been willing to fully and properly answer the issues.

Instead, for the most part, they answer by simply denying. Thus, for example it isn't surprising that the trial Court in responding to the 2255 Petition (Appendix A) exaggerates the guilt indicating factors, shows the Court's misunderstanding of the reference to psychological principles, and totally misstates the defense contention on entrapment (which contrary to what was stated by the court, had nothing to do with prosecuting similar violators).

They don't have the right to blame the briefing. It is submitted the briefs in this case were excellently written, and the facts were accurately reported by the Appellant in his trial court briefs, and in his opening and reply appeal briefs. It is submitted that the Government briefs were not as well written, and didn't as fully bring the issues in focus, but were not poor either. Thus what has happened in this case is not proper. And it shouldn't be legal. Now this Court must act to change the situation. This "cover-up" is no more tolerable in the Judicial Branch than it is in the Executive Branch, and it's directly opposite to our values of Government.

The illegalities of this case are by themselves sufficient for this Petition to be granted and, without further pleadings, the Judgment vacated and the Writ issued. As stated earlier, while Dr. Di Bella maintains his innocence, it isn't necessary for the Court to believe his version for the judgment to be found void and therefore vacated.

LEGAL REASONS FOR THE SUPREME COURT TO VACATE JUDGMENT AND IMMEDIATELY GRANT WRIT OF HABEAS CORPUS

A PERSON MAY NOT BE APPROXIMATELY GUILTY

First, in America a person may not be "approximately" guilty of a crime. Over objection, the indictment was given to the Jury in this case and the language of the indictment was that an approximate number of prescriptions had been written (Appendix D). That is plain, severe, reversible error. There is no such law. Nothing more should need to be said: the responsibility of the jury before it is allowed to enter a conviction is to be convinced with definiteness and certainty that each of the issues has been proven beyond a reasonable doubt. NOT APPROXIMATELY.

WRITING OF PRESCRIPTIONS IN THE AGGREGATE IS NOT A CRIME

The second illegality is that there is no such crime as defined by the Second Circuit to the jury. The indictment charged a group of prescriptions had been written. While if this had merely appeared in the indictment it might not have been a flaw. However, the indictment was given to the jury and it never was explained to the jury that each prescription must be evaluated. Accordingly, any determination cannot be valid because one can't be guilty of prescribing a group of prescriptions; one only may be guilty of wrongfully writing one prescription. *United States v. Kirk*, 584 F.2d 773 (6th Cir. 1978). This is not sophistry. While one may have been convicted of many wrongful prescriptions and therefore guilty of prescribing a group of prescriptions, to merely allege the group takes away the necessity of each individual situation being analyzed. And, while it may appear to be intellectualizing, the criminal law is read narrowly, and, in fact, there is no crime for writing an aggregate number of prescriptions. While a finding on the group strongly suggests the individual prescription was incorrect it doesn't necessarily follow that such was the case.

Also, it deserves mention that because the word "approximately" was used the jury in actuality didn't even determine a definite group of prescriptions had been wrongfully written.

OFFENSE AS DEFINED BY THE SECOND CIRCUIT IS NOT A CRIME

The criminal offense of illegal distribution of drugs means that the person had the intent to commit a wrongful act and, in such a frame of mind, delivered a drug to another person. The second circuit makes the argument that in relation to doctors, the state of mind is irrelevant. *U.S. v. Vamos*, (1986) 797 F.2d 1146, *U.S. v. Sanchez-Acosta* (this case; the unpublished opinion is in the appendix). There is no such law as claimed by the Second Circuit. No other circuit agrees with them. Because of this conflict in the Circuits and the fundamental importance of this issue, as it directly effects hundreds of thousands of doctors who in turn are treating with drugs the population of the United States, now believed to be about 250 million people, the Court needs to review the matter. Further, an additional reason for

review is that the Supreme Court's decision in *U.S. v. Moore,* (1975) 423 U.S. 122, 96 S.Ct. 335, 46 L.Ed. 333, is not being interpreted correctly and therefore needs to be clarified.

This was used by the Second Circuit to say that what the experts said at trial didn't matter. Also, it appears to rationalize jury instructions which lacked an intent requirement in relation to the law on distribution and conscious avoidance. That isn't the law, however. Quite the contrary—it is presumed Congress requires unlawful intent of a felony crime unless Congress explicitly states otherwise. *Liparota v. Unites States,* (1985) 471 U.S. 419, 85 L.Ed. 434, 105 S.Ct. 2084. Thus, once again this judgment is void and therefore must be vacated.

SECOND CIRCUIT COURT OF APPEALS DIDN'T FOLLOW CORRECT LAW OF REVIEW AND THEREFORE THE CASE MUST BE REVERSED

In addition to the obvious glossing over of the facts which was addressed earlier in this pleading there are other errors by the Second Circuit. It also is obvious that no attempt was made to understand the actions of Dr. Di Bella. The Court of Appeals automatically assumed that methaqualone (quaalude) must be a bad drug because it was a scheduled drug and therefore everything else was an obvious criminal venture. It is submitted that while doctors are not or may not be as careful about controlled drugs as is a lawyer's impression that they should be, most of them, unlike lawyers and judges are not thinking in a framework of "cops and robbers", but are thinking they are treating genuine patients. Similarly, just because a drug is on a schedule, it is submitted, that doctors would not assume there was something wrong with it. In fact, practically all the sleeping pills and tranquilizers are somewhere on the controlled substance schedules, from I to V, and they are subject to being moved from one schedule to another. While those facts may not have been brought out clearly at trial, nevertheless the Court of Appeals was expected and required to evaluate the case according to law and not jump to conclusions.

The Appeals Court relies on the assertion that all reasonable inferences, and all issues of credibility must be resolved in favor of the Government. However, that omits a very important rule

which must be applied to this case. Here, on a related charge arising from the same set of facts, Dr. Di Bella was acquitted of a conspiracy. Arguably, this means that the underlying, substantive charges—the distribution counts—ought to be vacated. In fact, this is particularly true in light of how the substantive charges are phrased so that it is a group of prescriptions rather than an individual act. At the very least, the law requires the rule that when an inconsistency appears in the verdict a reviewing court "should be extraordinarily careful to scrutinize the record for the ascertainment of any prejudicial error". *Manley v. United States*, 238 F.2d 221 (1956). That wasn't done and therefore the case must be reviewed in accord with the Supreme Court's supervisory capacity.

This failure to make a meaningful analysis is confirmed by a quick reading of the Reply Brief by Dr. Di Bella and the Court's opinion—many issues simply were left unanswered. For example:

1. statistical evidence, such as proof by percentages, should not have been allowed to serve as "the" proof;

2. a standard of conduct which is within the scope of medical practice (a means of comparison) was not established by Expert witnesses.

3. the conscious avoidance instruction was improper to give and also incorrectly given.

4. the aiding and abetting instruction was improper to give.

SECOND CIRCUIT COURT OF APPEALS DIDN'T SUFFICIENTLY REVIEW SECTION 2255-HABEAS CORPUS BRIEF

Similar to their lack of analysis of the Appellant's original appeal, the Court of Appeals for the Second Circuit failed to adequately review the challenge to the legality of the proceedings filed by the Appellant on his own behalf. This was his brief authorized by the principles of Habeas Corpus and 28 U.S.C. 2255.

This was a thorough analysis of ineffective assistance of counsel. Even though he was criticizing this writer, this writer must admit it states a prima facie case and there should have been a

hearing ordered on the matter, as is required by 22 U.S.C. 2255. One of the major points that was made was that a proper investigation was not made into a mental defense. This is required by the Fifth Circuit, *Beavers v. Belkcam,* (1981) 636 F.2d 114 and thus a conflict exists with the Second Circuit.

A second point was that he did not know that a potential entrapment defense may have been available and he should have been informed of that. The Second Circuit's failure to act puts it in direct conflict with the Fifth Circuit. *United States v. Greenfield*, 554 F.2d 179, 54 A.L.R. Fed. 632.

Undoubtedly, the effect of the cumulative errors of this case even if a single one may not be sufficient is cause for reversal of this case.

CONCLUSION

Wherefore, it is requested that a Petition for Certiorari issue so that the actions of the lower courts may be reviewed, the illegal judgment be vacated, and the Appellant Geoffrey Di Bella be released from control of the United States, and for such other and further relief as the Court may find appropriate.

Respectfully submitted,

NICOLAS M. W. DI BELLA

March, 1989

Appendix A

United States District Court
Southern District of New York

Geoffrey A. W. Di Bella, M.D., et al.
(including G. A. W. Di Bella,
Petitioner,

against

United States of America,
Respondent.

87 Civ. 8764 (GLG)
ORDER

The petitioner moves to vacate his conviction in 1985 of two counts of unlawful distribution of methaqualone in violation of Title 21 U.S.C. §§ 812 and 841. Following the conviction, he appealed unsuccessfully. He thereafter commenced serving a two-year term of imprisonment which he continues to serve.

The petitioner alleges that there was a "complete miscarriage of justice" in his conviction. He was one of a number of defendants, including a handful of doctors charged with running "quaalude" clinics. In addition to being a licensed medical doctor, he was also a qualified psychiatrist. The evidence at trial clearly established, with respect to the petitioner, that he wrote 771 prescriptions for quaaludes in 27 working days and as many as 96 in a single day. Patients would come in to see him, spend five minutes, pay $200.00 in cash, and he would then present them with their desired prescription for the controlled substance. He turned away only one patient in 100. The rest paid their money and got their drugs.

In arguing that his conviction was a miscarriage of justice, he contends that his attorney (his brother) prevented him from or failed to establish that because of his emotions and personality he could not have had a criminal intent. As he describes it in his petition, "my immaturities involved the medical diseases of Bulemia and Avoidant and Compulsive Personality Disorders. Part of the manifestation of these diseases include a severe

naivete, literal-kindedness, severe interpersonal awkwardness, and poor ability to judge many aspects of reality."

One of the goals of psychiatry is to have patients confront the consequences of their own actions. This doctor-psychiatrist has been unable to do that. While he and the other doctors attempted to argue to the jury that they thought these drug users were legitimate patients in need of prescriptions, and that they saw nothing unusual in having so many patients with the same illness in need of the same drug, the jury quickly disposed of that contention. The fact that the "patients" laid out over $150,000.00 for petitioner's prescriptions in a period of 27 days clearly gave the transactions a commercial overtone.

This petitioner, who still refers to himself as doctor (apparently his license to practice medicine has not been revoked), not only violated the law but made a mockery of the Hippocratic oath in his sworn duty not to do harm to his patients. That his time in jail has not led to an acceptance of his responsibility is indeed sad. The conditions of which he claims to have suffered during his period of criminal activity would not, under any circumstances, be a defense to the charges against him in light of the overwhelming proof.

The petitioner raises a number of other issues which, as noted in this court's order of December 16, 1987, were either frivolous, raised on appeal or waived by failure to raise them. In addition, there is another issue which was decided on the appeal of a co-defendant (severance). We have considered all of the grounds urged by the petitioner, including the frivolous claim that he was entrapped into illegal activity by the failure of the Government to prosecute similar violators, and dismiss his petition as being meritless.

SO ORDERED.

Dated: White Plains, N.Y.
April 4, 1988

GERARD L. GOETTEL
Gerard L. Goettel
U.S.D.J.

Appendix B

United States Court of Appeals
for the
Second Circuit

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-first day of December, one thousand nine hundred and eighty-eight.

Docket Number 88-2225

Geoffrey A.W. Di Bella, M.D.
(including G.A.W. Di Bella),
Plaintiff-Appellant,

v

United States of America,
Defendant-Appellee.

[Filed Dec. 21, 1988]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant Di Bella

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

by /s/ Fred Cassidy
Deputy Clerk

United States Court of Appeals
for the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of October, one thousand nine hundred and eighty-eight.

Present: Honorable Ellsworth A. Van Graafeiland, Honorable Richard J. Cardamone, Honorable Lawrence W. Pierce, Circuit Judges.

Geoffrey A. W. Di Bella, M.D.
(including G.A.W. Di Bella),
Plaintiff-Appellant,

against

United States of America,
Defendant-Appellee.

ORDER
Docket No. 88-2225

[Filed Oct. 20, 1988]

Geoffrey Di Bella, *pro se*, appeals from an order entered on April 4, 1988 in the United States District Court for the Southern District of New York (Goettel, J.), which denied his habeas corpus petition filed pursuant to 28 U.S.C. § 2255.

On March 14, 1985 appellant was charged with conspiracy to distribute a controlled substance outside the scope of professional medical practice, in violation of 21 U.S.C. § 846, and with the unlawful distribution of a controlled substance (methaqualone, sold under the trade name "Quaalude"), in violation of 21 U.S.C. § 841(a)(1). Following a jury trial, he was found guilty in violation of the unlawful distribution charge, but was acquitted of distributing outside the scope of medical practice. We affirmed the conviction, *United States v. Di Bella*, Dkt. No. 86-1224 (2d

Cir. Nov. 19, 1986), *cert. denied*, 107 S. Ct. 3184 (1987), and his petition for a writ of certiorari was denied on June 8, 1987. *Di Bella v. United States*, 107 S. Ct. 3184 (1987). Throughout all these proceedings, Di Bella was represented by counsel.

The principal thrust of appellant's petition is that his conviction was a "complete miscarriage of justice" because his attorney failed to establish that his emotions and personality were inconsistent with criminal intent, and that his trial should have been severed from that of his co-defendants.

Dec. 29, 1988
Issued as mandate:

We affirm the denial of the habeas petition for the reasons states in Judge Goettel's careful opinion dated April 4, 1988.

The order of the district court is affirmed.

/s/ ELLSWORTH A. VAN GRAAFEILAND
Ellsworth A. Van Graafeiland, U.S.C.J.
/s/ RICHARD J. CARDAMONE
Richard J. Cardamone, U.S.C.J.
/s/ LAWRENCE W. PIERCE
Lawrence W. Pierce, U.S.C.J.

Appendix C

The pertinent part of 21 U.S.C. 841 is:

(a) Except as authorized by this subchapter, it shall be unlawful for any person to knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

The pertinent part of 21 U.S.C. 822:

(b) Persons registered by the Attorney General under this subchapter to manufacture, distribute, or dispense controlled substances are authorized to possess, manufacture, distribute, or dispense such substances (including any such activity in the conduct of research) to the extent authorized by their registration and in conformity with the other provisions of this subchapter.

The pertinent parts of 21 U.S.C. 802 are:

(8) the terms "deliver" or "delivery" mean the actual, constructive, or attempted transfer of a controlled substance, whether or not there exists an agency relationship.

(10) the term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling or compounding necessary to prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject.

(11) The term "distribute" means to deliver (other than by administering or dispensing) a controlled substance. The term "distributor" means a person who so delivers a controlled substance.

(20) The term, "practitioner" mean a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital or other person . . . permitted, by the United States . . . to distribute, dispense, conduct research with respect to, administer, or use in teaching or

chemical analysis, a controlled substance in the course of professional practice or research.

(21) The term "ultimate user" means a person who has lawfully obtained, and who possesses, a controlled substance for his own use or for the use of a member of his household or for an animal owned by him or by a member of his household.

Appendix D

COUNT EIGHT

The Grand Jury further charges:

Between on or about November 10, 1981, and on or about February 18, 1982, at the 34th Street Clinic in the Southern District of New York, DR. GEOFFREY Di BELLA, the defendant, unlawfully, intentionally and knowingly did cause to be distributed and dispensed, outside the scope of professional medical practice, approximately 33,240 dosage units of Quaalude (Methaqualone), a Schedule II (now a Schedule I) controlled drug substance.

(Title 21, United States Code, Section 812, 841(a)(1), 841(b)(1)(B) prior to amendment on October 12, 1984, by Public Law Number 98-473, Title 11, Section 502; Title 18, United States Code, Section 2).

COUNT NINE

The Grand Jury further charges:

Between on or about March 1, 1982, and on or about June 30, 1982, at 60 East 42nd Street, New York, New York in the Southern District of New York, DR. GEOFFREY Di BELLA, the defendant, unlawfully, intentionally and knowingly did cause to be distributed and dispensed, outside the scope of professional medical practice, approximately 5812 dosage units of Quaalude (Methaqualone), a Schedule II (later a Schedule I) controlled drug substance.

(Title 21, United States Code, Section 812, 841(a)(1), 841(b)(1)(B) prior to amendment on October 12, 1984, by Public Law Number 98-473, Title 11, Section 502; Title 18, United States Code, Section 2).

Appendix E

United States Court of Appeals
for the Second Circuit

At a stated term of the United States Court of Appeals for the Second Circuit, held in the United States Courthouse in the City of New York on the 19th day of November, one thousand nine hundred and eighty-six.

Present:

Hon. Ellsworth A. Van Graafeiland,
Hon. Lawrence W. Pierce, *Circuit Judges,*
Hon. Morris E. Lasker, *District Judge.**

86-1224, 86-1303, 86-1342

United States of America,
Appellee,

vs.

Dr. Manuel Sanchez-Acosta, Dr. Geoffrey Di Bella,
and Dr. Irving Greenfarb,
Defendants-Appellants

ORDER

[Filed Nov. 19, 1986]

Appeal from judgments of conviction in the United States District Court for the Southern District of New York (Goettel, J.). Appellants Sanchez-Acosta, Di Bella, and Greenfarb were convicted of the illegal distribution of methaqualone (more commonly known by its trade name, "Quaalude") in violation of 21 U.S.C. §§ 812, 841(a)(1) & 841(b)(1)(B). Appellant Greenfarb was also convicted of conspiring to violate federal narcotics laws under 21 U.S.C. § 846.

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* Hon. Morris E. Lasker, Senior Judge, United States District Court for the Southern District of New York, sitting by designation.

1. Appellants allege that there was insufficient evidence to establish that they were dispensing medication in bad faith. Appellants contend that in their best judgment they believed that their patients were suffering from sleep disorders and that Quaalude was the proper remedial medication. Appellants also allege that they were practicing in good faith because they were advised by competent counsel that their activities were legitimate.

When reviewing the sufficiency of the evidence, we must draw all reasonable inferences, and resolve all issues of credibility in favor of the Government. Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Martino, 759 F.2d 998, 1002 (2d Cir. 1985). The totality of the evidence adduced at trial clearly supports the jury's verdicts of guilt in this case. Each of the defendants wrote Quaalude prescriptions for more than 95% of their patients; patient examinations were very brief (usually lasting only five minutes), while the fees were quite high ($150 to $200 per visit); and further, expert testimony indicated that the medical operation was a sham. The evidence was therefore sufficient to support the verdicts.

2. Apropos appellants' argument that the prosecutor's misconduct deprived them of a fair trial, a criminal conviction will not be overturned on review unless the prosecutor's misconduct caused substantial prejudice to the defendants in the case. United States v. Biasucci, 786 F.2d 504, 514 (2d Cir.) (citations omitted), *cert. denied*, 107 S. Ct. 104 (1986). Here, appellants basically rely on two incidents to support their claim of prosecutorial misconduct. One, an altercation between the prosecutor and defense counsel, occurred outside the presence of the jury and therefore could not have resulted in prejudice. The second involved a remark before the jury, made on the first day of the month-long trial, which could be interpreted as inferring that defendant Gourji's attorney could be indicted. (Gourji did not appeal.) The prosecutor said: "You are not a defendant yet, sir." The district court immediately struck the remark from the record and chastised the prosecutor, the prosecutor apologized twice for the comment, and thereafter the district court cautioned the jury to disregard the remark. These actions eliminated any substantial

prejudice to the defendants. See United States v. Bagaric, 706 F.2d 42, 58 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983).

Although we find that the prosecutor's actions did not result in substantial prejudice to appellants so as to deprive them of a fair trial, we agree that the prosecutor's outbursts and conduct were highly improper and inappropriate. Accordingly, we direct that the record herein be forwarded to the Committee on Grievances of the United States District Court for the Southern District of New York for its review of the prosecutor's conduct and for whatever action it finds to be warranted.

3. Appellants also allege that the district judge's questioning of a defense expert witness deprived them of a fair trial. Federal Rule of Evidence 614(b) specifically authorizes a trial court to "interrogate a witness, whether called by itself or a party." Indeed, a trial judge has the responsibility to assist the jury in determining the truth. United States v. Bronston, 658 F.2d 920, 930 (2d Cir. 1981), *cert. denied*, 456 U.S. 915 (1982). A conviction should be reversed only when the trial judge's conduct was so partial to the prosecution that it became a factor in determining the defendant's guilt. United States v. Pisani, 773 F.2d 397, 402 (2d Cir. 1985) (citations omitted). In this case, Judge Goettel questioned the expert witnesses of the Government as well as those of the defense. The record indicates that the trial court's questions were designed to amplify and clarify the statements of the experts. While Judge Goettel may have expressed doubt as to the defense expert's testimony in the presence of the attorneys, no such opinion was expressed before the jury. Finally, the district court instructed the jury that it should not assume that the court had an opinion about the case merely because it asked questions. Thus, we hold that the appellants were not denied a fair trial.

4. Finally, appellants argue that, by allowing expert witnesses to express an opinion concerning whether the defendants engaged in a good faith medical practice, the district court violated Federal Rule of Evidence 704(b) because, appellants urge, such testimony would address "the mental state or condition of a defendant." However, this Court has recently made clear that "good faith medical practice" in the context of the federal narcotics laws

is determined by objective standards and does not involve a defendant's subjective state of mind. United States v. Vamos, 797 F.2d 1146, 1152-53 (2d Cir. 1986). Since the expert witnesses here merely expressed their opinion that the medical practice of defendants did not conform to reasonable good faith standards, Federal Rule of Evidence 704(b) was not violated. Even if it was, the abundance of other evidence in this case would render a violation of 704(b) harmless error.

We have considered the other contentions of the appellants and find them to be without merit. Accordingly, we affirm the judgments of conviction.

/s/ ELLSWORTH A. VAN GRAAFEILAND
Hon. Ellsworth A. Van Graafeiland

/s/ LAWRENCE W. PIERCE
Hon. Lawrence W. Pierce

/s/ MORRIS E. LASKER
Hon. Morris E. Lasker,
District Judge

N.B.: Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.